ARTICLE

Oil and the Public Trust Doctrine in Washington

*Ralph W. Johnson**

I. INTRODUCTION

The tragic spill of millions of gallons of oil into Alaska's Prince William Sound alerted the people of Washington to the danger of spills in Puget Sound.[1] In Washington, the danger heightens as the amount of oil transported through the Sound increases. Indeed, Coast Guard figures show about 1,500 tanker movements in Puget Sound in 1988, a 50 percent increase over 1974.[2] Moreover, the spill from the Exxon Valdez taught us that, because very little can be done after a spill,[3] the only truly effective means of preventing damage from oil spills is to prevent them in the first place.

This Article proposes a unique source of prevention: the public trust doctrine. The public trust doctrine dates from ancient times and protects the public interest in navigation, commerce, and fisheries.[4] The trust gives to the public an

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* Professor of Law, University of Washington; B.S. in Law 1947, LL.B., University of Oregon. Prepared with the support of the Washington Sea Grant Program, University of Washington. The author is grateful for the fine research assistance of Rachael Paschal and Craighton Goepple.

1. M. BECKER & P. COBURN, SUPERSPILL (1989). Numerous smaller spills into Washington waters, such as the 3,100-gallon Texaco spill of February 1991, continue to generate public apprehension about the dangers of oil transportation and storage.

2. *Id.* at xi.

3. "In spite of industry pronouncements, in spite of regulators' assurances, in spite of the enormous amounts of resources expended, in spite of everyone's best intentions, contingency plans for major oil spills simply do not constitute a productive response to their subject." Clarke, *Oil Spill Fantasies*, ATLANTIC MONTHLY 65, 76 (Nov. 1990). As one tanker captain rightly says, "the best thing you can do [after a major spill occurs] is to uncork another bottle of whiskey." (A poor prescription for Captain Hazelwood, but one that illustrates the point.) *Id.*

4. A select few of the articles regarding the public trust doctrine in general include Ausness, *Water Rights, The Public Trust Doctrine, and the Protection of Instream Uses*, 1986 U. ILL. L. REV. 407; Dunning, *The Public Trust Doctrine and Western Water Law: Discord or Harmony?*, 30 ROCKY MT. MIN. L. INST. 17-1 (1984);

easement-like interest,[5] which predates all private ownership,[6] in the protected resources. The fundamental resources to which the public trust applies are navigable waters, their tributaries, and their beds.[7] However, state courts are now expanding the doctrine to protect the public's interest in recreation,[8] wildlife habitat,[9] and water-quality management.[10] The doctrine is both a source of, and a limitation upon, legislative and administrative power over the protected resources. The doctrine also provides common law remedies to the state as well as to private citizens, beyond existing statutes, for threats or damage to public trust resources.[11]

During the past 15 years, in half the United States, more than 100 reported cases involving the public trust doctrine have had a major impact on natural resources protection.[12] In Washington, two key cases decided in 1987 give major support to the public trust doctrine. In *Caminiti v. Boyle*,[13] the court affirmed that the public trust doctrine is the law of this state and always has been. In *Orion Corporation v. State*,[14] the court upheld the classification of private tidelands as open space and stated that classification that prohibits fill for residential housing and development raises no constitutional ques-

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Johnson, *Public Trust Protection For Stream Flows and Lake Levels*, 14 U.C. DAVIS L. REV. 233 (1980); Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Question the Public Trust Doctrine*, 71 IOWA L. REV. 631 (1986); Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269 (1980).

Several articles have also been written about Washington's public trust doctrine. Some of those articles include Allison, *The Public Trust Doctrine in Washington*, 10 U. PUGET SOUND L. REV. 633 (1987); Johnson & Cooney, *Harbor Lines and the Public Trust Doctrine in Washington Navigable Waters*, 54 WASH. L. REV. 275 (1979); Note, *The Public Trust Doctrine: Accommodating the Public Need Within Constitutional Bounds*, 63 WASH. L. REV. 1087 (1988).

5. Orion Corp. v. State, 109 Wash. 2d 621, 640, 747 P.2d 1062, 1072-73 (1987), *cert. denied*, 486 U.S. 1022 (1988).

6. *Id.* at 640-41, 747 P.2d at 1073.

7. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195, 201 (1980).

8. *See, e.g.*, *Orion*, 109 Wash. 2d at 641, 747 P.2d at 1073 (quoting Wilbour v. Gallagher, 77 Wash. 2d 306, 316, 462 P.2d 232 (1969), *cert. denied*, 400 U.S. 878 (1970)).

9. *See, e.g.*, Marks v. Whitney, 6 Cal. 3d 251, 259-60, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971).

10. *See, e.g.*, National Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 34, *cert. denied*, 464 U.S. 977 (1983).

11. *See, e.g.*, *Marks*, 6 Cal. 3d at 261-62, 491 P.2d at 381, 98 Cal. Rptr. at 797 (1971).

12. *See* Lazarus, *supra* note 4, at 644.

13. 107 Wash. 2d 662, 732 P.2d 989 (1987), *cert. denied*, 484 U.S. 1008 (1988).

14. 109 Wash. 2d 621, 747 P.2d 1062 (1987), *cert. denied*, 486 U.S. 1022 (1988).

tion because tidelands have always been subject to the burden of the public trust.[15] Thus no "taking" occurred for such classification.[16] The court further indicated that the doctrine would be construed liberally in this state. Thus, as the decisions in *Caminiti* and *Orion* make clear, Washington is establishing a pattern of reliance on the public trust doctrine.

II. HISTORICAL ORIGINS OF THE PUBLIC TRUST DOCTRINE

The public trust doctrine originated from the widespread public practice, dating from ancient times, of using navigable waters as public highways for navigation, commerce, and fisheries. The earliest articulation of the doctrine is sometimes attributed to the Institutes of Justinian of 533 A.D., which provided that the doctrine applied to the air, running water, the sea, and the seashores.[17]

In England, the doctrine was well established by the time of the Magna Carta.[18] Leading English court decisions[19] recognized that the Crown held the beds of navigable waters in trust for the people for navigation,[20] commerce, and fisheries.[21] Even the Crown could not destroy this trust.[22]

A. Early Applications of the Public Trust Doctrine in the United States

The public trust doctrine was recognized and upheld in the

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15. *Id.* at 641-62, 747 P.2d at 1073.

16. However, the court sent the case back for trial to determine whether a regulatory taking occurred because the zoning prohibited uses such as fish farming and oyster growing that were not restricted by the public trust.

17. *Id.* at 662, 747 P.2d at 1084. J. Inst. 2.1.1. The Institutes of Justinian, a general textbook of Roman law, was issued around 533 A.D. AN ENCYCLOPEDIA OF WORLD HISTORY 172 (W. Langer rev. ed. 1952). *See* Lazarus, *supra* note 4, at 633-34.

18. Clause 33, Magna Carta. For a full discussion of the public trust doctrine in old English law, see U.S. FISH & WILDLIFE SERVICE, PUBLIC TRUST RIGHTS (1978).

19. *See* 2 H. BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND, 16-17, 39-40 (S. Thorne trans. 1968).

20. Attorney General v. Parmeter, 10 Price 378, 147 Eng. Rep. 345 (Ex. 1811), *aff'd sub. nom* Parmeter v. Gibbs, 10 Price 412, 147 Eng. Rep. 356 (H.L. 1813).

21. Carter v. Murcot, 4 Burr. 2162, 98 Eng. Rep. 127 (K.B. 1768); Le Case del Royall Piscarie de le Banne, 1 Davys 55, 80 Eng. Rep. 540 (K.B. 1610); *see* 1 WATER AND WATER RIGHTS, 179-80 (R. Clark ed. 1970).

22. For a comprehensive analysis of Roman, civil law, and common law development of the public trust doctrine, see PUBLIC TRUST RIGHTS, *supra* note 18. The author summarizes the English authorities, saying that the King had a private right (*jus privatum*) that could be granted to others, but the public right (*jus publicum*) was held by the Crown for his subjects and could not be alienated.

United States as early 1821 in the case of *Arnold v. Mundy*.[23] In *Mundy*, the New Jersey court declared the trust as we know it today. The dispute concerned an oyster bed that was part of a conveyance from the King of England prior to statehood. Conveyances eventually led to Arnold's ownership and use of the area as a private oyster bed. This exclusive use was challenged by Mundy, who insisted that the public had a right to take oysters in this area as it had done for many years. The court ruled in favor of Mundy, giving the first clear formulation to the doctrine, saying that under natural law, civil law, and common law, the navigable rivers in which the tide ebbs and flows and the beds and waters of the seacoast are held by the sovereign in trust for the people.[24]

The court stated that the states, being sovereign governments, had succeeded to the English trust which was held by the Crown and that a grant purporting to divest the citizens of these common rights was void. The court held that the people, through their government, may regulate public trust resources by building ports, basins, docks, wharves, dams, locks and bridges, by reclaiming land, and by improving fishing places. However, the sovereign power itself "cannot . . . make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right."[25]

Seventy years later the United States Supreme Court built upon the principles articulated in *Mundy* and used the public trust doctrine to invalidate one of the more outrageous land giveaways of the nineteenth century.[26] In 1869 the Illinois legislature deeded the bed of Lake Michigan along the entire Chicago waterfront to the Illinois Central Railroad. In 1873 the legislature apparently suffered pangs of conscience and repealed the grant. Ten years later the state sued in state court to establish the invalidity of the Railroad's continued assertion of ownership over the harbor bed.[27] The United States Supreme Court held the revocation valid, saying that a grant of all the lands under navigable waters of a state was "if not void on its face, . . . subject to revocation." The state can-

23. 6 N.J.L. 1 (1821).

24. *Id.* at 76-77.

25. *Id.* at 78.

26. Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892).

27. The company removed the case to federal court where it stayed because the company raised the issue of whether the repeal offended the contracts clause and the fourteenth amendment due process clause of the federal constitution. *Id.* at 433.

not "abdicate its trust over property in which the whole people are interested . . . [any more than it can] . . . abdicate its police powers."[28]

Mundy and *Illinois Central* establish that the public trust doctrine is part of the common law of the United States, and that it is a powerful doctrine. These cases hold that legislatures will be held to a high standard, a trust-like standard, with regard to these resources. The language of the two opinions suggests that the public trust doctrine may be strong enough even to limit legislative power. At the least the doctrine establishes a potent rule of construction requiring that legislatures conveying away or changing the status of public trust resources must do so explicitly.

B. The Development of the Public Trust Doctrine as a State Law Doctrine

The public trust doctrine has become increasingly attractive to the courts and has now been applied in most states.[29] Needless to say, its scope is different in various states, not so much because some states reject the doctrine, but because courts only respond to cases that are brought before them.

Charles Wilkinson argues persuasively that the public trust doctrine "is rooted in the commerce clause and became binding on new states at statehood."[30] For more than 150 years, he says, "the Supreme Court has consistently given a constitutional cast to state and federal prerogatives and obligations with regard to waters navigable for title, due ultimately to the key role of these watercourses in the country's commerce and society and in the formation of the national government."[31]

The federal courts, however, have had little occasion to define the parameters of the doctrine, with the exception of

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28. *Id.* at 453.

29. *See* Lazarus, *supra* note 4.

30. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 459 (1989).

31. *Id.* Professor H. Dunning says: "More indicative of the doctrine's fundamental nature . . . is the way the courts, the originators of the doctrine in this country, have in some states concluded that the doctrine is so entrenched as to be immune from legislative abolition. In those states, the public trust doctrine has assumed the character of an implied constitutional doctrine, much like the related equal footing doctrine in federal law. Dunning, *The Public Trust: A Fundamental Doctrine of American Property Law*, 19 ENVTL. L. 515, 516 (1989).

Illinois Central Railroad Co. v. Illinois.[32] Hence, the task of defining the scope of the doctrine has been left largely to state courts. California and Massachusetts developed the doctrine more extensively than most states with Wisconsin, Minnesota, New Jersey, Washington, Michigan, and a few other states not far behind. The doctrine has not been totally rejected in any state, although its application varies state by state and its application to particular facts has been denied.

One of the most important functions of the doctrine is to define private property rights that are the subject of police power regulation.[33] Reliance on the doctrine can occur by explicit legislative language[34] or by implication.[35]

III. THE SCOPE OF THE PUBLIC TRUST DOCTRINE: A NATIONAL SURVEY

A. The Initial Protection: Navigable Waters

In England the doctrine was applied primarily to the bed of the sea and to tidelands.[36] The United States, by contrast, has large navigable rivers such as the Mississippi and Columbia Rivers flowing inland for hundreds of miles. Not surprisingly, the United States courts extended the doctrine to cover navigable fresh waters.[37] Thus, in this country, the doctrine covers

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32. 146 U.S. 387 (1892).

33. *See* Orion Corp. v. State, 109 Wash. 2d 621, 747 P.2d 1062 (1987), *cert. denied*, 486 U.S. 1022 (1988).

34. *See, e.g.*, OR. REV. STAT. § 537.332 (1988). This statute provides for preservation of water for in-stream "public uses," including recreation, maintenance of fish and wildlife habitat, pollution abatement and navigation and explicitly recognizes that in-stream water rights will not diminish the public's rights under the public trust doctrine. *Id.* Section 537.455 also provides for conservation of water and use of the conserved water for in-stream purposes, including recreation, protection of fish and wildlife, pollution abatement, navigation, scenic attraction, and "any other similar or related use . . . protected by the public trust." *Id.* § 537.455.

35. For example, the *Orion* court upheld classification of tidelands pursuant to the Washington Shoreline Management Act, WASH. REV. CODE § 90.58, even though the act nowhere explicitly mentions the public trust doctrine. *Orion*, 109 Wash. 2d at 644, 747 P.2d at 1072. Under this rationale, and California cases such as City of Berkeley v. Superior Court, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, *cert. denied*, 449 U.S. 840 (1980), the California Coastal Zone Conservation Act of 1972, Cal. Pub. Res. Code § § 30000-30821 (West 1986 and 1990 Supp.), would also be considered an expression of the public trust doctrine.

36. Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892). More contemporary authors contend the public trust doctrine applied to navigable fresh waters in England, too. *E.g.*, 4 WATERS AND WATER RIGHTS 105 (R. Clark ed. 1970); PUBLIC TRUST RIGHTS, *supra* note 18, at 29.

37. Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977).

all waters "navigable in fact," whether fresh or salt.

Navigability for title is determined as of the date the state entered the union.[38] Under the equal footing[39] doctrine the title to the beds of all navigable waters, fresh or salt, automatically went to each state at statehood. Prior to statehood the federal government held title to these lands, which were chiefly valuable for "commerce, navigation, and fisheries . . . in trust for the future states."[40] The government could convey these beds away only in case of some "international duty or public exigency."[41] Just as the original thirteen states held title to the beds of navigable waters, so must each new state hold such title if they are to be on an equal footing with the original thirteen. Accordingly, analysis of navigability for title is essentially a determination of title to federal land, i.e., whether title to the land passed to the state at statehood. Because state law cannot control the disposition of the federal domain,[42] the test of navigability for title is necessarily a federal test.[43]

Navigability for title is determined by the natural and ordinary condition of the water at the time the state entered the Union, not whether it could be made navigable at some future time by artificial improvements.[44] However, the fact that rapids, rocks, or other obstructions make navigation difficult will not destroy title navigability so long as the waters were usable for a significant portion of the time.[45] Navigability in intrastate commerce is all that is required, not usability in interstate commerce. Lastly, the waters must be usable by the

38. United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1941); United States v. Utah, 283 U.S. 64, 75 (1931).

39. The equal footing doctrine arises by implication from the Constitution and provides that new states must be admitted on an equal footing with the original 13 states. New states, therefore, have the same governing powers, including the power of governance over federal lands, as do the original states. New states also acquire, as of the instant of statehood, the title to the beds of navigable rivers and lakes, because the original 13 states held such titles. *See* Wilkinson, *supra* note 30, at 427 n.9.

40. Shively v. Bowlby, 152 U.S. 1, 49 (1894).

41. *Id.*

42. United States v. Utah, 283 U.S. 64 (1931); Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77 (1922).

43. United States v. Utah, 283 U.S. 64 (1931); United States v. Holt State Bank, 270 U.S. 49 (1926); *Brewer-Elliott Oil & Gas Co.*, 260 U.S. 77 (1922).

44. United States v. Oregon, 295 U.S. 1 (1935); United States v. Utah, 283 U.S. 64 (1931); Economy Light Co. v. United States, 256 U.S. 113 (1921); United States v. The Montello, 87 U.S. 430 (1874).

45. *Economy Light & Power Co.*, 256 U.S. 113 (1921); *The Montello*, 87 U.S. 430 (1874).

"customary modes of trade or travel on water."[46] It includes waters as shallow as three or four feet that are geographically located so they have been, or can be used by canoes and rowboats for commercial trade and travel, but would not include a waterbody that, although large and deep enough to float commercial vessels, lies in an isolated mountain area where no commerce occurs.[47]

The public trust doctrine protects the public interest in the beds of navigable waters, up to mean high tide on the ocean, and mean high water mark on fresh waters.[48] No use can be made of the beds of such waters without meeting conditions imposed by the doctrine.

B. The Scope of the Traditional Public Trust Protection: Commerce, Navigation and Fisheries

The traditionally protected interests include commerce, navigation and fisheries.[49] These interests themselves are quite broad, because protection of fisheries implicitly includes protection of water quality.[50] Even in earlier days, the scope of protected interests was often stated more broadly and more

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46. *Holt State Bank*, 270 U.S. 49 (1926). This may include waters usable for commercial log floating. *See* Johnson & Austin, *Recreational Rights and Titles to Beds on Western Lakes and Streams*, 7 NAT. RESOURCES J. 1 (1967).

47. *See* Johnson & Austin, *supra* note 46.

48. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988). Most states extend public trust rights from the seaward limit of the territorial sea to the mean high tide line. A handful of states, however, recognize full public trust protection only seaward of the low tide line. These states are Delaware, Maine, Massachusetts, New Hampshire, Pennsylvania, Virginia, and Wisconsin. D. Connors & J. Archer, The Public Trust Doctrine: Its Role in Managing America's Coasts (Aug. 2, 1990) (unpublished manuscript).

49. Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892).

50. In Alaska the public trust doctrine, as defined in its constitution, article VIII, § 3, applies to "fish, wildlife, and water resources." Both "navigable" and "public" waters are declared to be held in trust. ALASKA CONST. art. VIII, § 3; Alaska Stat. 46.15.030 (1990); Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. 664, 677 (D. Alaska 1977). The Alaska Constitution clearly extends the trust in Alaska beyond traditional boundaries when it protects "wildlife," because this trust protects wildlife wherever found. This includes land as well as water areas.

The statute also makes it clear that the Alaska trust goes beyond navigable waters, by declaring that it applies to both "navigable" and "public" waters. It also seems that all waters "wherever occurring in a natural state" are public waters under § 46.15.030. *See also Alaska Public Easement Defense Fund*, 435 F. Supp. 664 (D. Alaska 1977). These extensions indeed give the public trust doctrine a broad reach in Alaska.

Regardless of where the right of fishery is recognized, it is meaningless unless fish are there to be caught. If the water is polluted, the fish die. Thus the right of fishery necessarily includes an implied right to water quality sufficient to support the fishery.

specifically. In *Arnold v. Mundy*,[51] the court included within the protective reach of the doctrine, "fowling, sustenance and all other uses of the water and its products. . . ."[52] Recent cases state explicitly that other interests are also protected. The California Supreme Court, in the oft-cited case of *Marks v. Whitney*,[53] wrote:

> Public trust easements are traditionally defined in terms of navigation, commerce, and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes . . . and to use the bottom of the navigable waters for anchoring, standing, or other purposes [citing cases].
>
> The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another [citing cases]. There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area. It is not necessary to here define precisely all the public uses which encumber tidelands.[54]

Similarly, the Washington courts have taken an expansive view of the scope of the public trust doctrine. In *Orion*, the Washington Supreme Court noted that it "had occasion to extend the doctrine beyond navigational and commercial fishing rights to include 'incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes.' "[55] The *Orion* court also cited with approval public trust cases that allowed damages for harmful effects on water-

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51. 6 N.J.L. 1 (1821).

52. *Id.* at 12.

53. 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971). *Marks v. Whitney* has been broadly cited by other state courts since 1971. *E.g.*, Orion Corp. v. State, 109 Wash. 2d 621, 641 n.10, 747 P.2d 1062, 1073 n.10 (1987), *cert. denied*, 486 U.S. 1022 (1988) (where the court paraphrased the *Marks* holding that the "public trust protects ecological values and right to preserve tidelands in natural state.")

54. *Marks*, 6 Cal. 3d at 259-60, 491 P.2d at 380, 98 Cal. Rptr. at 796.

55. *Orion*, 109 Wash. 2d at 642, 747 P.2d at 1073 (quoting Wilbour v. Gallagher, 77 Wash. 2d 306, 316, 462 P.2d 232 (1969), *cert. denied*, 400 U.S. 878 (1970)).

fowl from an oil spill,[56] protected ecological values,[57] and preserved tidelands in their natural state.[58] The court also cited Professor Wilkinson's conclusion that the doctrine has gone beyond its original water-based scope and now applies to public lands that have special importance for health, welfare, and safety of the public.[59] "[T]rust principles are reflected in . . . [the protection] against adverse effects to the public health, and land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto."[60] The court added that "[r]esolution of this case does not require us to decide the total scope of the doctrine,"[61] thus implicitly inviting further expansion.

However, the most relevant judicial expansion of the public trust doctrine regarding state control of oil transport is the courts' recognition that the public trust doctrine protects water quality. The California Supreme Court's holding in *National Audubon Society v. Superior Court*[62] (the *Mono Lake* case) illustrates the point. In holding that the public trust doctrine offered an independent basis for challenging water diversions,[63] the court noted that extraction of water from the tributaries to the lake would result in lowering the surface water level, reducing the quantity of water in the lake and thus its assimilative capacity. In turn, these reductions would cause the water to become more saline and, in effect, more polluted. The pollution would ultimately disrupt the ecosystem by killing brine shrimp on which the birds live, causing damage to the bird population. The ultimate effect of lowering the surface water level would be to damage these public trust resources.

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56. *Orion*, 109 Wash. 2d at 641 n.10, 747 P.2d at 1073 n.10 (citing In re Steuart Transp. Co., 495 F. Supp. 38 (E.D. Va. 1980)).

57. Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971). The Washington Supreme Court said, "Recognizing modern science's ability to identify the public need, state courts have extended the doctrine beyond its navigational aspects." *Orion*, 109 Wash. 2d at 641, 747 P.2d at 1073.

58. *Marks*, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).

59. Wilkinson, *supra* note 4.

60. 109 Wash. 2d at 641 n.11, 747 P.2d at 1073 n.11 (citation omitted).

61. *Id.* at 641, 747 P.2d at 1073.

62. 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346, *cert. denied*, 464 U.S. 977 (1983).

63. *Id.* at 452, 658 P.2d at 732, 189 Cal. Rptr. at 369.

C. The Scope of the Nontraditional Public Trust Protection: Beyond Navigable Waters

In a number of western states the public trust doctrine also applies to waters that are navigable only for pleasure craft,[64] that is, waters not large enough to be navigable for commercial use. In the *Mono Lake* case, the court applied the doctrine to non-navigable tributaries of navigable waters, citing the potentially adverse effects of water extractions from such tributaries on navigable Mono Lake. The California court made it clear that "if the public trust doctrine applies to constrain *fills* which destroy navigation and other public trust uses in navigable waters, it should equally apply to constrain the *extraction* of water that destroys navigation and other public interests. Both actions result in the same damage to the public interest."[65]

In *United Plainsmen Association v. North Dakota State Water Conservation Commission*,[66] the North Dakota Supreme Court prohibited the issuance of water appropriation permits for coal-related power and energy production facilities until a comprehensive state-wide, water-use plan was completed, taking into account such uses as navigation, commerce, and fisheries. The court specifically ruled that the public trust doctrine applied to the allocation of water as well as to conveyance of lands that lie under or abut water resources.[67]

In *Muench v. Public Service Commission*,[68] the Wisconsin Supreme Court used the public trust doctrine to deny a local government the power to commit a statewide resource (a fishing stream) to power generation purposes, thus requiring more broadly based political decisionmaking. In *Priewe v. Wisconsin State Land and Improvement Co.*,[69] the Wisconsin Supreme Court also voided a state law that authorized the draining of Muskego Lake, a navigable body of water, for private develop-

64. *See* Johnson, *Water Pollution and the Public Trust Doctrine*, 19 ENVTL. L. 485 (1989).

65. 33 Cal. 3d 419, 436-37, 658 P.2d 709, 720, 189 Cal. Rptr. 346, 357, *cert. denied*, 464 U.S. 977 (1983).

66. 247 N.W.2d 457 (N.D. 1976).

67. *Id.* at 461.

68. 261 Wis. 492, 53 N.W.2d 514, *aff'd on rehearing*, 261 Wis. 515, 55 N.W.2d 40 (1952).

69. 93 Wis. 534, 67 N.W. 918 (1896), *aff'd on rehearing*, 103 Wis. 537, 79 N.W. 780 (1899).

ment of a housing project. In affirming its earlier decision, the court stated that

> [t]he legislature has no more authority to emancipate itself from the obligation resting upon it which was assumed at the commencement of its statehood, to preserve for the benefit of all the people forever, the enjoyment of the navigable waters within its boundaries, than it has to donate the school fund or the state capital to a private purpose.[70]

In Massachusetts, the doctrine has been extended to cover state parks[71] and swamps,[72] whether or not connected to navigable waters. Thus, in Massachusetts, courts have held that the highway department could not build a highway on public trust swamp land under its general authority to use public lands for highway construction.[73] For such lands, the court held, the department would have to get specific authority from the legislature, indicating that the legislature was fully aware that the highway would destroy or damage public trust resources.[74]

Like these courts, the Washington Supreme Court has also expanded the protection of the public trust doctrine to non-traditional resources. For example, when open space regulations are adopted for wetlands, the Washington court has recognized that the public trust doctrine defines the property rights of tidelands owners. The court in *Orion Corporation v. State*[75] held that tidelands acquired between 1963 and 1968 remain subject to the trust burden and may not be developed in a manner which substantially impairs the public's right of navigation, including recreational navigation, fishing, and other incidental uses. The issue of an unconstitutional taking of trust burdened property interests is avoided because the public trust easement predated private ownership of Orion's land. In reaching that conclusion, the court cited with approval cases that extended the doctrine to waters that are only "recreationally navigable," and to shorelands lying totally above water.[76]

The *Orion* court's extension of the public trust protection

70. 103 Wis. at 549-50, 79 N.W. at 781.

71. Gould v. Greylock Reservation Comm'n, 350 Mass. 410, 215 N.E.2d 114 (1966).

72. Robbins v. Dept. of Public Works, 355 Mass. 328, 244 N.E.2d 577 (1969).

73. *Id.*

74. *Id.*

75. 109 Wash. 2d 621, 747 P.2d 1062 (1987), *cert. denied*, 486 U.S. 1022 (1988).

76. *Id.* at 641 n.10, 747 P.2d at 1073 n.10.

to shorelands is important to oil spill prevention in Washington because it allows the public trust doctrine to define the property rights affected by police power regulations. The public trust doctrine is gradually expanding, or is being interpreted more expansively, as the competition for resources increases. In his seminal article on the public trust doctrine,[77] Joseph Sax argued that the doctrine should apply to resource management questions any time "diffuse public interests need protection against tightly organized groups with clear and immediate goals."[78] As examples of forces from which public interests need protection, Sax mentions air pollution, the dissemination of pesticides, strip mining, and wetland filling.[79] Water pollution clearly falls within this test, and the tenor of the courts' decisions is moving in this direction. Of course, given the development needs of a complex society, states may occasionally find it essential to convey away, or destroy public trust resources.

D. State Powers to Convey Public Trust Resources or to Destroy Public Trust Interests

Ever since the United States Supreme Court's 1892 decision in *Illinois Central Railroad Co. v. Illinois*,[80] courts have held that legislatures have the power, within certain constraints, to destroy public trust interests by legislative action. In *Illinois Central*, the Supreme Court stated that grants of land free of the public trust would be justified if occupation by private persons did "not substantially impair the public interest in the lands and waters remaining" or if the public interest in navigation and commerce improves.[81]

For legislation to convey away public trust resources, the legislative intent must be either express or exceptionally clear. The Massachusetts and California courts have spoken most extensively on this issue. In *City of Berkeley v. Superior Court*[82] the California Supreme Court held that privately owned tidelands in San Francisco Bay were burdened by the public trust. Referring to its *City of Berkeley* decision, the

77. Sax, *supra* note 4.

78. *Id.* at 556.

79. *Id.*

80. 146 U.S. 387 (1892).

81. *Id.* at 452.

82. City of Berkeley v. Superior Court, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, *cert. denied*, 449 U.S. 840 (1980).

court in the *Mono Lake* case said "we held that the grantees' title was subject to the trust, both because the Legislature had not made clear its intention to authorize a conveyance free of the trust and because the 1870 act and the conveyances under it were not intended to further trust purposes."[83] The California court also stated in *City of Berkeley* that "statutes purporting to abandon the public trust are to be strictly construed; the intent to abandon must be clearly expressed or necessarily implied; if any interpretation of the statute is reasonably possible which would retain the public's interest in tidelands, the court must give the statute such an interpretation."[84]

In *Orion Corporation v. State*,[85] the Washington Supreme Court cited *City of Berkeley* with approval, emphasizing that privately owned tidelands were no longer subject to the trust only where they had been rendered substantially valueless by dredging and filling. The court quoted *City of Berkeley* to the effect that any lands still physically adaptable for trust uses were subject to the trust burden.[86] The Washington court said that even express legislation could not abrogate the trust with respect to the tidelands; that the legislature never had authority to sell or abdicate state sovereignty or dominion over tidelands and shorelands; and that the legislature could not relinquish the trust by a transfer of the property.[87] This view seems to give the public trust doctrine Constitution-like power.

The *Mono Lake* case presents a vivid illustration of the courts' refusal to hold that laws enacted many years ago, without explicit consideration of the public trust implications, destroy public trust rights. The question at issue was whether appropriative water rights issued in the 1930s and 1940s were free of the public trust burden.[88] The California Supreme

83. National Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 439, 658 P.2d 709, 723, 189 Cal. Rptr. 346, 360, *cert. denied*, 464 U.S. 977 (1983).

84. *City of Berkeley*, 26 Cal. 3d at 528, 606 P.2d at 369, 162 Cal. Rptr. at 334.

85. 109 Wash. 2d 621, 747 P.2d 1067 (1987), *cert. denied*, 486 U.S. 1022 (1988).

86. *Id.* at 640 n.9, 747 P.2d at 1072 n.9.

87. *Id.* at 639, 747 P.2d at 1072 (citations omitted). This view also raises another question. Does the public have a right to walk upon or fish from privately owned beaches? Other courts have so held. *E.g.*, Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971); Neptune City v. Avon-by-the-Sea, 61 N.J. 296, 294 A.2d 47 (1972); *cf.* Opinion of the Justices, 365 Mass. 681, 313 N.E.2d 561 (1974) (right to fish with boats only, and no right to pass, swim, or sunbathe).

88. Viewed historically, the prior appropriation system (including the Washington system) must stand as a special interest doctrine. Johnson, *supra* note 64. Although it purports to deal with "all" waters of the state and rights thereto, in fact the system was designed to allocate water only among appropriators. *Id.* at 489-90. It was not

Court held that the 1913 Water Commission Act[89] (California's basic appropriation code), and appropriation permits issued thereunder by the California Water Board to the Los Angeles Department of Water and Power to extract water from tributaries of Mono Lake for domestic use in Los Angeles did not terminate public trust interests in Mono Lake.[90]

In issuing the 1940 permits, the board explicitly stated that it had "no choice" but to grant the applications despite the harm that would occur to the lake. The board acknowledged that lowering the lake level would decrease the recreational and aesthetic advantages of Mono Lake, but ruled that there was nothing it could do.

When reviewing the board's 1940 permit, the California Supreme Court said the water rights were issued without any consideration of the impact upon the public trust and that, therefore, the trust still exists and demands contemporary consideration.[91] The court went one important step further and added that even if public trust interests had been considered when the permits were issued, the state could nonetheless change the allocation under the public trust doctrine to reflect

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intended to allocate water vis-a-vis other uses. It was specifically not designed to include, or to destroy, public trust interests. *Id.* at 490. It was not designed to cover riparian rights, because those were recognized in Snively v. Jaber, 48 Wash. 2d 815, 296 P.2d 1015 (1956); In Re Martha Lake Water Co. No. 1 v. Nelson, 152 Wash. 53, 277 P.382 (1929), and other cases. It was not designed to cover ground water because the legislature enacted a ground water code in 1945. Johnson, *supra* note 64, at 490; Act of Mar. 19, 1945, ch. 263, 1945 Wash. Laws 826 (codified as amended at WASH. REV. CODE ANN. §§ 90.44.010-.450 (1962 & Supp. 1991)). It was not designed to cover water quality management because the legislature enacted pollution control code in 1945. Act of Mar. 16, 1945, ch. 216, 1945 Wash. Laws 608 (codified as amended at WASH. REV. CODE §§ 90.48.010-.910 (1962 & Supp. 1991)).

Until recently, the prior appropriation system and the public trust doctrine operated independently of each other. The prior appropriation cases simply are not concerned with pollution. Because of this vacuum a substantial body of statutory and regulatory water pollution control laws have been enacted, at both the federal and state levels. Meantime the prior appropriation system has rolled along, concerning itself almost not-at-all with pollution.

89. Water Commission Act of 1913, 1913 Cal. Stat. 592.

90. National Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346, *cert. denied*, 464 U.S. 977 (1983).

91. *Id.* at 426, 658 P.2d at 712, 189 Cal. Rptr. at 349. In dicta in the *Mono Lake* case, the court extended the power of the state to protect trust resources even further. "The state accordingly has the power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on public trust." *Id.* at 447, 658 P.2d at 728, 189 Cal. Rptr. at 365. *See also* Golden Feather Community Ass'n v. Thermalito Irr. Dist., 199 Cal. App. 3d 402, 244 Cal. Rptr. 830 (1988), *vacated on other grounds*, 209 Cal. App. 3d 1276, 257 Cal. Rptr. 836 (1989).

current needs.[92]

The decision of a California superior court in *Atlantic Richfield Co. (ARCO) v. State Lands Commission*[93] provides another example of the power of the public trust doctrine. The California State Land Commission denied ARCO's request to locate two platforms on state tidelands in the Goleta area in southern California. ARCO contended that an environmental impact statement had been prepared in 1974, 1980, 1982, and 1987, for different stages of the leasing and exploration process, that it had a vested right to go forward with the platforms, and that the commission's denial was arbitrary and capricious. The court upheld the denial, finding that, under the state public trust doctrine, the state-owned beds of navigable waters are always subject to the public trust burden. The court noted:

> This is the beauty of the California doctrine that all public lands are forever held in the public use until irrevocably, physically and actually used. Thus, in conformity with such doctrine, thousands of acres of California offshore tideland are always subject to the public trust doctrine until so developed.[94]

The court said that the original leases with ARCO had been negotiated years ago when there was no way to forecast changes in certain aspects of oil development, such as the enactment of comprehensive laws, the 1969 Union Oil well blowout, the creation and construction of a major educational institution in Santa Barbara renowned for its scientific study of marine life, and the increasing need to protect and preserve the few remaining shore areas. The court stated that the commission was to consider all of these factors in light of the public trust doctrine in deciding whether to allow construction of the two platforms. Because of the complexity of that decision, the commission's decision to delay was not, therefore, arbitrary or capricious.[95]

Even when public trust resources are transferred into private ownership they are still subject to the trust until they are

92. *National Audubon Soc'y*, 33 Cal. 3d at 447, 658 P.2d at 728, 189 Cal. Rptr. at 365. Alaska and Idaho courts recently cited the California court's decision in the *Mono Lake* case with approval. *E.g.*, CWC Fisheries, Inc. v. Bunker, 755 P.2d 1115 (Alaska 1988); Kootenai Envtl. Alliance v. Panhandle Yacht Club, 105 Idaho 622, 671 P.2d 1085 (1983).

93. No. C-663-010 (Super. Ct. of Los Angeles County, 1990).

94. *Id.*

95. *Id.*

filled, built upon, or otherwise altered so that their value as trust resources is substantially destroyed. The underlying issue is the impact on trust-protected resources. Thus, the California court in the *Mono Lake* case voided permits allowing extraction of water that caused a loss of assimilative capacity, which in turn resulted in a form of pollution harmful to wildlife. The courts in *ARCO* and *Orion* disallowed actions that risked deposits of oil or fill into public trust waters. While the factual difference may be interesting, it is not functionally significant. As the California court stated in the *Mono Lake* case, the effect of a fill and of an extraction are the same: "both . . . result in the same damage to the public interest."[96]

In summary, state action that damages or destroys public trust resources will generally be upheld only where the legislation authorizing the action refers explicitly to a particular parcel of land and just as clearly states the legislature's recognition that the conveyance will damage or destroy public trust resources on that land.[97] The cases further require that the conveyance be made in furtherance of a specifically stated public purpose. Even then the action by the state may not withstand a public trust challenge. In *Orion*, it may be recalled, the court said that the legislature has never had authority to sell or abdicate state sovereignty or dominion over tidelands and shorelands,[98] and possibly cannot relinquish the trust even by transferring the property. This requirement sets a high judicial standard against which to measure the validity and meaning of legislation affecting public trust resources.

It is thus apparent that the public trust doctrine, as now construed by California and other courts, can become a significant source of control for all kinds of pollution, including oil pollution. The Washington Supreme Court's language in *Orion* does not discourage that conclusion.

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96. *National Audubon Soc'y*, 33 Cal. 3d at 436-37, 658 P.2d at 720, 189 Cal. Rptr. at 357.

97. Opinion of the Justices, 383 Mass. 895, 424 N.E.2d 1092 (1974); City of Berkeley v. Superior Court, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, 606 P.2d 362, *cert. denied*, 449 U.S. 577 (1980).

98. Orion Corp. v. State, 109 Wash. 2d 621, 639, 747 P.2d 1062, 1072 (1987), *cert. denied*, 486 U.S. 1022 (1988) (quoting Caminiti v. Boyle, 107 Wash. 2d 662, 666, 732 P.2d 989, 992 (1987)). Other courts have made similar statements. For example, in Sacco v. Department of Public Works, 352 Mass. 670, 227 N.E.2d 478, 479-80 (1967), the court said that land appropriated to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation.

IV. THE PUBLIC TRUST DOCTRINE IN WASHINGTON

One reason that the public trust doctrine did not receive early common law confirmation by the Washington courts is that many of the interests protected by the doctrine were the subject of the harbor line system mandated by article XV of the Washington Constitution. The harbor line system has generally succeeded in reserving these commercially important areas for public ownership and control and for orderly public-interest development.

Article XV mandates that the state's harbor areas "shall be forever reserved for landings, wharves, streets, and other conveniences of navigation and commerce."[99] In addition to

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99. WASH. CONST. art. XV, § 1. Article XV provides:

§ 1 *Harbor Line Commission and Restraint on Disposition.*

The legislature shall provide for the appointment of a commission whose duty it shall be to locate and establish harbor lines in the navigable waters of all harbors, estuaries, bays and inlets of this state, wherever such navigable waters lie within or in front of the corporate limits of any city, or within one mile thereof on either side. Any harbor lines so located or established may thereafter be changed, relocated or reestablished by the commission pursuant to such provision as may be made therefor by the legislature. The state shall never give, sell or lease to any private person, corporation, or association any rights whatever in the waters beyond such harbor lines, nor shall any of the area lying between any harbor line and the line of ordinary high water, and within not less than fifty feet nor more than two thousand feet of such harbor line (as the commission shall determine) be sold or granted by the state, nor its rights to control the same relinquished, but such area shall be forever reserved for landings, wharves, streets, and other conveniences of navigation and commerce.

§ 2 *Leasing and Maintenance of Wharves, Docks, Etc.* The legislature shall provide general laws for the leasing of the right to build and maintain wharves, docks and other structures, upon the areas mentioned in section one of this article, but no lease shall be made for any term longer than thirty years, or the legislature may provide by general laws for the building and maintaining upon such area wharves, docks and other structures.

§ 3 *Extension of Streets Over Tide Lands.* Municipal corporations shall have the right to extend their streets over intervening tide lands to and across the area reserved as herein provided.

WASH. CONST. art. XV (1889, amended 1932, amend. 15).

The Washington Constitution calls for establishment of harbor lines "within or in front" of incorporated cities and "within one mile . . . on either side." In 1927 the legislature directed the Commission to establish outer harbor lines, marking the outer boundary of the harbor beyond which the state can never grant any rights, and inner harbor lines, marking the landward extent of the harbor area. WASH. REV. CODE § § 79.92.010-.900 (1989). The bed of the harbor area is owned by the state and is "forever reserved for landings, wharves, streets, and other conveniences of navigation and commerce." WASH. CONST. art. XV, § 1. Within these limitations, the state can build structures in the harbor area or lease it to private persons for a period not to exceed thirty years. WASH. REV. CODE §§ 79.92.010-.900 (1989).

The width of the harbor area was originally between fifty and six hundred feet,

restricting the harbor area to certain uses, a primary purpose of the harbor line system is to retain state control of the harbor area.[100] Thus, the state owns the beds of harbor areas and may lease portions to private persons and corporations, but retains control over the leased area through lease terms. Courts have interpreted the language of article XV to allow pipelines and cables, bridge piers and some aquaculture projects.[101] The harbor line system merely defines the way particular state property may be used; that is, it defines and limits the state's property rights vis-a-vis state harbor areas. Therefore, although the harbor line system protects some of the same public interests traditionally protected by the public trust doctrine, it does not replace that doctrine.[102]

In addition to the protection of harbor areas offered by article XV, early Washington cases recognized other legally protectable public interests in navigable water and beds of the state, although they did not rely explicitly on the public trust doctrine.[103] In *Hill v. Newell*,[104] the Washington court explicitly approved the reasoning of the leading California public trust case,[105] saying that the public trust language of the California case expressed the views of the Washington court.[106] In

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but then in 1932 was extended to 2,000 feet. The outer harbor line is generally located in water deep enough to accommodate vessels with the maximum expected draft. The inner harbor line is generally at or near the line of low tide, but because harbor areas must include only state-owned land, it is never nearer to the shore than state ownership extends.

The Harbor Line Commmission's duties have now devolved onto the Board of Natural Resources within the Department of Natural Resources. WASH. REV. CODE § 79.92.010 (1989).

100. "The manifest purpose of this section [WASH. CONST. art. XV, § 1] is to prevent the control of the water front of cities from ever falling into private hands." Chlopeck Fish Co. v. City of Seattle, 64 Wash. 315, 323, 117 P. 232, 235 (1911).

101. *See Chlopeck Fish Co.*, 64 Wash. 315, 117 P. 232 (1911); State *ex rel.* Hulme v. Grays H. & P.S. Ry., 54 Wash. 530, 103 P. 809 (1909); *see also* Johnson & Cooney, *Harbor Lines and the Public Trust Doctrine In Washington Navigable Waters*, 54 WASH. L. REV. 275 (1979).

102. *See* Orion Corp. v. State, 109 Wash. 2d 621, 747 P.2d 1062 (1987), *cert. denied*, 486 U.S. 1022 (1988); Caminiti v. Boyle, 107 Wash. 2d 662, 732 P.2d 989 (1987), *cert. denied*, 484 U.S. 1008 (1988).

103. Madson v. Spokane Valley Land & Water Co., 40 Wash. 414, 82 P. 718 (1905); Dawson v. McMillan, 34 Wash. 269, 75 P. 807 (1904).

104. 86 Wash. 227, 149 P. 951 (1915).

105. People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913).

106. Hill v. Newell, 86 Wash. 227, 231, 149 P. 951, 952 (1915). The California court had recognized that the state title to the beds of navigable waters was absolute, and if, pursuant to a plan to improve navigation, a portion is cut off and no longer useful for navigation, that portion can be alienated from the trust. *Id.* at 232, 149 P. at 953.

State v. Sturtevant,[107] the court acknowledged that the state held the rights of navigation "in trust for the whole people" of this state.[108]

Still not expressly using the term "public trust," the Washington Supreme Court, in *Wilbour v. Gallagher*,[109] affirmed the public right to navigate, swim, boat, fish, bathe, and recreate in navigable waters—interests traditionally protected by the public trust doctrine.[110] Gallagher wanted to fill part of navigable Lake Chelan, on a portion of the bed that he owned. Wilbour owned nearby land on the lake and sued to stop Gallagher's fill. The Washington Supreme Court upheld the lower court's injunction prohibiting the fill on the ground that the fill violated the public right of navigation and would be allowed only if some public entity, such as a city, county, or state government, issued a permit for the fill. At the time, no system for such permits existed in the state. As a result of the decision in *Wilbour v. Gallagher*, the Washington legislature enacted the Shoreline Management Act, which creates such a system.[111]

Eighteen years later, the Washington Supreme Court grappled with the relationship between the Shoreline Management Act and the public trust doctrine in *Orion Corp. v. State*.[112] In *Orion*, the court dealt with the tidelands at Padilla Bay, which have long been used by the public for navigational and recreational purposes. In 1963, Orion began purchasing tideland acreage for creating a Venetian-style, residential community. By 1968 Orion had acquired 5,600 acres of tidelands and in 1971 acquired options for additional acreage. While Orion's plan was moving forward, the Washington Supreme Court decided

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107. 76 Wash. 158, 135 P. 1035 (1913).

108. *Id.* at 165, 135 P. at 1037. In Commercial Waterway Dist. v. Permanente, 61 Wash. 2d 509, 513, 379 P.2d 178, 180 (1963), the court stated that "[l]and held by a municipal corporation [a Waterway district] in trust for the public is not subject to being alienated unless expressly so provided by the legislature."

109. 77 Wash. 2d 306, 462 P.2d 232, *cert. denied*, 400 U.S. 878 (1969).

110. *Id.* at 316, 462 P.2d at 232. The court in *Orion* acknowledged that *Wilbour v. Gallagher* was a public trust case. 109 Wash. 2d 621, 641, 747 P.2d 1062, 1073 (1987), *cert. denied*, 486 U.S. 1022 (1988).

111. WASH. REV. CODE § § 90.58.010-.930 (1990). Under the Shoreline Management Act, each local government prepares a master program classifying the waters within their jurisdiction and the reach of the act, including all navigable water beds, most beds of nonnavigable waters, plus 200 feet of adjacent uplands. One major purpose of this classification is to discourage filling and building of non-water-dependent structures on the beds of state waters. *See* WASH. REV. CODE § 90.58.020 (1990).

112. 109 Wash. 2d 621, 747 P.2d 1062 (1987).

Wilbour v. Gallagher,[113] finding that "the public has the right to go where the navigable waters go, even though the navigable waters lie over privately owned lands."[114]

When the Shoreline Management Act was enacted in 1971, Padilla Bay was classified as a "shoreline of statewide significance," especially slated for preservation in a natural state. Skagit County subsequently classified the tidelands as "aquatic," which prohibited their dredging and filling. The only permitted uses were nonintensive recreation and aquaculture. The state subsequently offered to buy the land at $100 per acre, but Orion declined. Orion then sued to declare the classification unconstitutional as an unlawful "taking."

The Washington Supreme Court rejected Orion's taking argument on the ground that Orion never had the right to dredge and fill its tidelands. First, the court stated the public trust has always existed in the state of Washington.[115] Thus, even prior to enactment of the Shoreline Management Act, Orion's property was burdened by the public trust doctrine. As a result, at the time Orion purchased the tidelands, it could make no use of these tidelands that would substantially impair the public trust values of navigation, fishing, water, and environmental quality. The court noted that if the regulation went so far as to ban public trust uses, then conceivably a taking could occur. Because a property right must exist before it can be taken, neither the Shoreline Management Act nor the Skagit County Shoreline Master Program, which prohibited fills of and construction on the tidelands, effected a taking by prohibiting Orion's projects. The court concluded that because the public trust doctrine defined Orion's property rights, the Shoreline Management Act, as a police power regulation, did not take any rights.[116]

Formal adoption of the public trust doctrine, upon which the *Orion* court expressly relied to protect the Padilla Bay tidelands and uphold the Shoreline Management Act, had occurred a short time earlier in *Caminiti v. Boyle*.[117] In 1983 the legislature enacted a statute allowing upland owners abutting aquatic lands to install and maintain without charge recreational docks over state-owned shorelands, tidelands, or beds of

113. 77 Wash. 2d 306, 462 P.2d 232, *cert. denied*, 400 U.S. 878 (1970).

114. *Id.* at 315-16, 462 P.2d at 238.

115. *Orion*, 109 Wash. 2d at 641, 747 P.2d at 1073.

116. *Id.* at 641-42, 747 P.2d at 1073.

117. 107 Wash. 2d 662, 732 P.2d 989 (1987), *cert. denied*, 484 U.S. 1008 (1988).

navigable waters.[118] The plaintiffs sued the state commissioner of public lands for failing to challenge the Act as contravening the public trust. The court held that the public trust did not apply to these facts, but nonetheless fully embraced the doctrine, stating:

> [T]he sovereignty and dominion over this state's tidelands and shorelands, as distinguished from *title*, always remains in the State, and the State holds such dominion in trust for the public. It is this principle which is referred to as the "public trust doctrine." Although not always clearly labeled or articulated as such, our review of Washington law establishes that the doctrine has always existed in the State of Washington.[119]

Although it embraced the public trust doctrine, the court held that it did not require the state to charge rent for recreational docks in navigable waters.[120]

C. Other Applications of the Public Trust Doctrine in Washington

The public trust doctrine might have altered the outcome of earlier cases or administrative decisions. For example, in *Department of Ecology v. Ballard Elks Lodge No. 827*,[121] the Shorelines Hearings Board ruled that the City of Seattle had wrongly denied a substantial development permit to the Ballard Elks Club for construction of a lodge building that would extend over tidelands. On appeal, the trial court held that the Shorelines Hearings Board decision was clearly erroneous and reinstated the permit denial. But the state supreme court reversed, holding that the Shorelines Hearings Board was a quasi-judicial body, that it had acted within its discretion, and that its decision was not clearly erroneous.[122] The supreme court stated that courts should give decisions of the Shorelines Hearings Board due deference because of its specialized knowledge.[123]

The public trust doctrine was not raised in *Ballard Elks Lodge*, and was not considered by the court. If the case were to

118. *See* WASH. REV. CODE § 79.90.105 (1989).
119. *Caminiti*, 107 Wash. 2d at 669-70, 732 P.2d at 994 (footnotes omitted).
120. *Id.* at 663, 732 P.2d at 992 .
121. 84 Wash. 2d 551, 527 P.2d 1121 (1974).
122. *Id.* at 559, 527 P.2d at 1126.
123. *Id.* at 556, 527 P.2d at 1124.

be decided today, after the *Caminiti* and *Orion* holdings have made clear that the doctrine is state law, the result would likely be different: The public trust doctrine would have limited the discretion of the Shorelines Hearings Board. These cases require that before the public trust can be destroyed, as arguably a lodge over tidelands would, the legislature must explicitly identify the land at issue, recognize that the legislative authorization will destroy the public trust as to that property, and assure that the conveyance or permit is for a public, not private, purpose. In *Ballard Elks Lodge* none of these three criteria were met, and the Shorelines Hearings Board could not have issued the permit.

A second example of where the public trust doctrine may have changed the law in this state involves the movement of harbor lines. Article XV of the Washington Constitution required the state harbor line commission to establish harbor lines in state navigable waters that lie within or in front of any incorporated city or within one mile on either side.[124] Although a 1932 amendment decreed that harbor lines could be changed or relocated pursuant to criteria to be established by the state legislature, the legislature has never established such criteria. However, in a letter opinion written before *Caminiti* and *Orion*, the attorney general said there are two criteria: (1) changes in location may not destroy the viability of the harbor area,[125] and (2) changes must be "in the public interest and not for the gain of private parties."[126] The public interest requirement was the same, the opinion noted, as that established for all public agencies. Now that *Caminiti* and *Orion* have established the public trust doctrine as part of state law, the opinion should emphasize the unique criteria established by the public trust doctrine. These public trust criteria would strongly affirm that harbor lines can be changed only for a public use,[127] and that public trust interests in navigation,

124. WASH. CONST. art., XV, § 1.

125. Op. Wash. Att'y Gen. 62 (1976).

126. *Id.* at 8.

127. This could affect a case such as the following: In 1976 the Howard S. Wright Development Company requested a harbor line relocation seaward of Piers 50-51 in Seattle, Washington, so that a proposed development of a hotel/office tower would be on state-owned tidelands rather than in the harbor area. The Board of Natural Resources of the Department of Natural Resources, acting as the Harbor Line Commission, adopted Resolution 218, relocating the inner harbor line, said in the resolution that the reason for moving the lines was to assist the development by avoiding constitutional restrictions. The resolution also stated it was in the public

fishery, recreation, and environmental quality must be given protection under the doctrine.

In addition to changing the outcome of some earlier cases, the Washington Supreme Court's adoption of the public trust doctrine in *Caminiti* and *Orion* likely overrules other early cases. For example, in *Portage Bay-Roanoke Park Community Council v. Shorelines Hearings Board*,[128] the court said that any benefits bestowed on the public by the public trust doctrine prior to 1971 have been "superseded and the SMA [Shoreline Management Act] is the present declaration of that doctrine."[129] However, the court did not present this concept in either *Caminiti* or *Orion*, and the concept should not be followed if the court means what it says in *Orion*: "[w]hile the State has authority to convey title to these properties, '[t]he Legislature has never had the authority . . . to sell or otherwise abdicate state sovereignty or dominion over such tidelands and shorelands.' "[130] As the Washington Supreme Court concluded in *Orion*, the Shoreline Management Act is not a replacement for the public trust doctrine. Rather, it is an exercise of state police power over property rights that are defined by the common law public trust doctrine. The California Supreme Court, considering a similar question, said "the public trust imposes a duty of continuing supervision over the taking and use of . . . water. . . . [T]he State is not confined by past . . . decisions which may be incorrect in light of current knowledge or inconsistent with current needs."[131]

V. The Relationship Between the Public Trust Doctrine and the State Police Power

The public trust doctrine determines the nature of the public's ancient and preexisting easement-like rights in certain resources. Accordingly, it significantly enhances the potential application of the state's police power with respect to enacting legislation to manage oil transport activity and to prevent oil

interest. The action of the board was challenged by a public interest group. Ultimately, the project was dropped, so no judicial decision was forthcoming. For more detail, see Johnson & Cooney, *supra* note 101, at 307.

128. 92 Wash. 2d 1, 593 P.2d 151 (1979).

129. *Id.* at 4, 593 P.2d at 153.

130. Orion Corp. v. State, 109 Wash. 2d 621, 639, 747 P.2d 1062, 1072 (1987), *cert. denied*, 486 U.S. 1022 (1988) (quoting Caminiti v. Boyle, 107 Wash. 2d 662, 732 P.2d 989 (1987)).

131. National Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 447, 658 P.2d 709, 728, 189 Cal. Rptr. 346, 365, *cert. denied*, 464 U.S. 977 (1983).

spills on land or water, administering existing regulations, and allowing suits by state and private individuals to sue to protect trust resources.

Ordinarily the public trust doctrine would not serve as the basis for legislation. Usually, legislation is based on the state's police power. However, when the police power is used to strictly regulate private property rights, the question often arises whether the regulations go so far as to constitute a regulatory taking.[132] Because the public trust doctrine exists from time immemorial, the burden it imposes through the regulation antedates private ownership. Such a burden is analogous to a government's easement across private land for public access. If the government thereafter by regulation bars the private owner from constructing a building that would interfere with the public access, no taking occurs by such regulation because the government's easement predates the private ownership interest. Therefore, the public trust as a basis for strict regulation is preferable to the police power because the public trust basis of such regulation will not be vulnerable to a taking attack. Because such attacks would be likely mounted against state regulations strictly regulating or prohibiting building of oil transport facilities or transport of oil, the public trust is the best foundation upon which to base oil pollution regulations.

The public trust doctrine also affects the state's exercise of its proprietary power, rather than its police power, over state-owned property. The public trust doctrine places limits on and establishes procedures for what the state can do with such property. For example, when public trust resources such as tidelands are assigned or conveyed to some other use, the intent of the legislature to change the use must be explicit and reflect legislative knowledge of the impact on trust resources. Furthermore, some cases hold that the other use must be a public use.[133] A barebones deed to a private individual of tidelands does not destroy the trust. Locating a highway over tidelands or wetlands requires explicit legislative action.[134]

The public trust doctrine also influences the decisions of state administrative agencies. As part of the common law of

132. *See, e.g.*, *Orion*, 109 Wash. 2d 621, 747 P.2d 1062 (the court compared and analyzed the police power and the public trust as sources of authority for regulations adopted under the Shoreline Management Act).

133. *See, e.g.*, National Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983).

134. Robbins v. Dept. of Public Works, 355 Mass. 328, 244 N.E.2d 577 (1969).

property of the state, the doctrine binds all administrative agencies, whether acting on their own behalf or issuing permits for another to act. The doctrine applies as common law whether or not implementing legislation has been enacted. Therefore, any time an agency considers a state project or issues a permit, such as one for locating oil transport or storage facilities, the agency officials *must* consider the impact on public trust resources.[135] In that consideration, the agency is bound by the substantive and procedural criteria established by the Washington courts for protecting public trust interests.

A final effect of the public trust doctrine is the expansion of standing to seek judicial protection of trust resources. Not only the state attorney general can enforce the public trust. Private individuals and organizations also have standing to bring suits to enjoin anyone, including an oil company, from violating or threatening to damage or destroy public trust resources.[136]

VI. PREEMPTION: A POTENTIAL LIMIT ON THE PROTECTIONS OF THE PUBLIC TRUST DOCTRINE

The supremacy clause of article VI of the United States Constitution provides that the Constitution and the federal laws enacted pursuant to it, as well as the treaties made by the United States, are the supreme law of the land and will preempt conflicting state laws.[137] Thus, laws enacted by the Congress pursuant to a constitutionally delegated power such as the commerce clause take precedence over inconsistent state law.

The Supreme Court has said that state law can be pre-

135. As part of the state common law of property, the public trust doctrine must be considered by state agencies similarly to the consideration of privately owned easements or servitudes. *See, e.g.*, *National Audubon Soc'y*, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346; United States v. State Water Resources Control Bd., 182 Cal. App. 3d 82, 227 Cal. Rptr. 161 (1986); *Robbins*, 355 Mass. 328, 244 N.E.2d 577 (1979); Wilbour v. Gallagher, 77 Wash. 2d 306, 462 P.2d 232 (1969), *cert. denied*, 400 U.S. 878 (1970); Bach v. Sarich, 74 Wash. 2d 575, 445 P.2d 648 (1968); Kemp v. Putnam, 47 Wash. 2d 530, 288 P.2d 837 (1955).

136. *See* Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971); Wilbour v. Gallagher, 77 Wash. 2d 306, 462 P.2d 232 (1969), *cert. denied*, 400 U.S. 878 (1970).

137. U.S. CONST. art. VI. For a more comprehensive study on preemption as applied to oil spill issues, see A. Rieser, *Federal Pre-emption Considerations for State Oil Spill Prevention and Response Arrangements*, Legal Research Report No. 4.2, *published in* ALASKA OIL SPILL COMMISSION, SPILL, THE WRECK OF THE EXXON VALDEZ, FINAL REPORT, APPENDIX M (February 1990).

empted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted. If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law; that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes of Congress.[138]

A third kind of preemption involves federal statutes providing that state law on a particular topic is prohibited. The language of such statutes is often ambiguous, and the analysis must proceed on a case by case basis to determine if conflict of law actually exists. In such cases, preemption is likely to be found where there is a strong national interest. For instance, preemption is most easily found where national uniformity is needed, such as regulations specifying design features for trains, airplanes, and ships. Where such interest exists, even minimal federal regulation will preempt state law. Conversely, preemption seldom occurs where the activity is local, and the activity regulated affects different locations in different ways.[139]

As noted above, the public trust doctrine works in conjunction with the state common law of property to define property rights. While there may well be a strong national interest in the protection of trust resources, there is less need of uniformity of statutory protection than in regulations specifying design features. The waters of the Great Salt Lake face different threats than do the waters of Puget Sound. As such, fulfillment of the obligation to protect public trust resources is best viewed as a state responsibility. Furthermore, because public trust resources are unique, regulated activities will affect the resources in various ways. Therefore, state statutes that are based on the public trust doctrine and that are enacted to protect public trust resources should not be preempted by federal law.

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138. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984).

139. For example, the Supreme Court in Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960), held that a federal law imposing an inspection requirement for ships' boilers was designed to assure the safety of the vessel and did not preempt state regulations limiting smoke emissions from ship boilers. The Court found that the two laws had different purposes: The federal purpose was vessel safety, and the state purpose was air quality management. *Id.* at 445-46.

Preemption depends on the intent of Congress.[140] If Congress intends that the legislation, or regulations promulgated under that legislation, preempt state law on the same topic, then the courts will find preemption. Although Congress's intent regarding preemption may be explicit, most federal legislation does not expressly preempt state law. This uncertainty leaves resolution of the issue to the courts.

The courts have established several criteria for determining whether a federal law preempts a state law. The Supreme Court adheres to the basic premise that the historic police powers of the states are not preempted unless such congressional intent is clearly manifested.[141] Using that premise as a starting point, courts will find preemption where the federal law is so pervasive there is no room left for state regulation, or where the federal interest is so dominant that the courts will assume state law is precluded, as with interstate railways[142] and air travel.[143]

Three leading cases on preemption concern oil transportation and spills. In *Askew v. American Waterways Operators, Inc.*[144] the Court upheld the Florida Oil Spill Prevention and Pollution Control Act of 1970, which imposes strict and unlimited liability for any private or state damages incurred as a result of an oil spill in Florida waters.[145] The act also authorizes the Florida Department of Natural Resources to enact regulations requiring marine terminals and oil tankers to maintain oil spill containment gear and equipment.[146] By contrast, the federal act, now referred to as the Clean Water Act,[147] provides for strict liability of marine terminal facilities and vessel operators for federal clean-up costs.[148] It also authorizes the President to promulgate regulations through the Coast Guard requiring terminal facilities and vessels to maintain spill prevention equipment.[149]

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140. R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130, 140 (1986) ("In determining whether Congress has invoked [the] pre-emption power, we give primary emphasis to the ascertainment of congressional intent.")

141. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

142. *See* Missouri Pac. R.R. v. R.R. Comm'n, 850 F.2d 264 (5th Cir. 1988).

143. *See* French v. Pan Am Express, 869 F.2d 1, 5 (1st Cir. 1989).

144. 411 U.S. 325 (1973).

145. *Id.* at 327.

146. *Id.* at 327-28.

147. 33 U.S.C. § § 1251-1356 (1985).

148. 33 U.S.C. § 1161, *superseded by* 33 U.S.C. § 1321 (1988).

149. 33 U.S.C. § 1161(j)(1), *superseded by* 33 U.S.C. § 1321.

The Supreme Court found no preemption of the Florida act, ruling that the federal act provides for recovery of only *federal* clean-up costs, and does not purport to provide for damages to the state or to private parties.[150] In addition, the federal act contains an explicit disclaimer of preemption for damages to state or private interests.

The Court's decision in *Askew* also hints that different state standards for oil transport activities that seem to require uniform national regulation may survive a preemption analysis, if the state law does not directly conflict with the federal law. Thus, with respect to Florida's ability to require specific containment gear for vessels and terminal facilities through regulations, the Court ruled that the state regulations were not *per se* invalid simply because the subject may require uniform federal regulation. The Court said that resolution of this question must await a concrete dispute under the applicable Florida regulations.[151] Thus, the Court implied that uniform federal standards are not necessary for oil spill liability and insurance questions. Therefore, federal regulations regarding oil transport might preempt state law in the future, but have not yet done so.

In *Ray v. Atlantic Richfield Co.* (ARCO),[152] a refinery and vessel owner challenged the Washington State Tanker Safety Act[153] claiming that the federal Ports and Waterway Safety Act (PWSA) of 1972[154] preempted it. The state law contained four major provisions, only parts of which the Court found preempted. The first provision of the state law required a state-licensed pilot for all federally enrolled and licensed tankers over 50,000 DWT navigating in Puget Sound.[155] The Court found no preemption of this provision to the extent that it required pilots for *foreign* trade vessels; however, the Court found that the clear language of the federal act preempted the provision's pilotage requirement for *interstate* shipping.[156]

The second provision of the state law banned outright the passage of supertankers (over 125,000 DWT) through the

150. Askew v. American Waterways Operators, Inc., 411 U.S. 325, 331 (1973).

151. *Id.* at 328, 332.

152. 435 U.S. 151 (1978).

153. WASH. REV. CODE §§ 88.16.170-.200 (Supp. 1991).

154. 33 U.S.C. § § 1221-36 (1988); 46 U.S.C. § 391a *recodified at* 46 U.S.C. § § 2101-14. (1988).

155. WASH. REV. CODE § 88.16.180.

156. *Ray*, 435 U.S. at 159-60.

Sound.[157] By virtue of the Coast Guard's authority under the federal act to establish "vessel size and speed limitations,"[158] the Court found preemption of the state law.[159]

The third provision of the state act imposed vessel design, construction, and navigational equipment standards on tankers between 40,000 and 125,000 DWT, including double bottoms, twin screws, and two radars.[160] Under the federal act, the Coast Guard had issued vessel size regulations, but only for the Rosario Straits.[161] Based upon the premise that Congress intended uniform design features for such equipment, the Court nonetheless found preemption of the state design standards even though the Coast Guard regulations dealt with vessels traversing only part of the Sound.[162] The Court noted that the state law requirement of an alternative tug escort for vessels not meeting these standards[163] was not preempted, but might later be by future Coast Guard regulations.[164]

More recently, the Ninth Circuit in *Chevron U.S.A. v. Hammond*[165] provided states with substantial latitude in controlling the environmental effects of oil transportation. In 1976 the State of Alaska enacted a law regulating tanker discharges of oil ballast into state waters.[166] Chevron USA challenged this law, claiming federal preemption by comprehensive regulations under the same Ports and Waterway Safety Act of 1972.[167] The Ninth Circuit found no preemption, distinguishing the decision in *Ray v. Atlantic Richfield Co.* on the ground that in *Ray*, Coast Guard design features were involved, whereas in *Chevron*, the state sought to regulate ocean pollutant discharges.[168] The court noted that "[t]he subject matter of environmental regulation has long been regarded by the court as particularly suited to local regulation."[169] The court looked to the federal Clean Water Act for policy guidance, finding

157. WASH. REV. CODE § 88.16.190(1).

158. 33 U.S.C. § 1221(3)(iii).

159. *Ray*, 435 U.S. at 178.

160. WASH. REV. CODE § 88.16.190(2).

161. *Ray*, 435 U.S. at 170-71 (*citing* 33 C.F.R. Part 161, Subpart B (1976), *as amended*, 42 Fed. Reg. 29480 (1977)).

162. *Ray*, 435 U.S. at 166.

163. WASH. REV. CODE § 88.16.190(2) (Supp. 1975).

164. *Ray*, 435 U.S. at 171-72.

165. 726 F.2d 483 (9th Cir. 1984), *cert. denied*, 471 U.S. 1140 (1985).

166. ALASKA STAT. 46.03.750(e) (1990).

167. 46 U.S.C. § 391a, *recodified* at 46 U.S.C. § § 2101-14 (1987).

168. *Chevron*, 726 F.2d at 487-88.

169. *Id.* at 488.

authority there for states to adopt stricter regulations regarding environmental quality and, thus, no compelling need for national uniformity.[170] The court noted that while design standards have national and international effects, the release of ballast into state waters is a local problem.[171]

The above cases establish that courts will find preemption quite readily where national or international uniformity is needed. On the other hand, the courts will not find preemption where the activity is local in nature, and where it has traditionally been regulated at the state or local level.

The most recent United States Supreme Court case on preemption in the environmental field, *California Coastal Commission v. Granite Rock Co.*,[172] illustrates the Court's unwillingness to find preemption of state environmental laws. The *California Coastal Commission* case arose out of the Granite Rock Company's desire to mine limestone on an unpatented mining claim on U.S. Forest Service land. The Forest Service issued a permit after it concluded that federal environmental requirements had been met. The California Coastal Commission also required Granite Rock to obtain a state permit under state law. The Court, rejecting Granite Rock's preemption arguments, held that none of three federal statutes, the National Forest Service Act,[173] Mining Act,[174] or the Federal Land Policy Management Act[175] preempted the state law, which had been designed to protect environmental quality.

Of course, Congress can make its intent quite clear about not preempting state environmental law, as it did in the 1990 federal Oil Pollution Act.[176] This 1990 Act explicitly provides that it shall not "affect, or be construed or interpreted as preempting, the authority of any State of political subdivision thereof from imposing any additional liability or requirements

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170. *Id.* at 492.

171. *Id.* For a contrary view, see Justice White's dissent from the denial of the petition for certiorari in this case, in which, among other things, he questioned the significance of the distinction between design specifications and operating procedures. Chevron U.S.A. v. Sheffield, 471 U.S. 1140, 1142 n.3 (1985) (White, J., dissenting).

172. 480 U.S. 572 (1987).

173. 90 Stat. 2949, 16 U.S.C. § 1600-1614 (1988).

174. 17 Stat. 91, *as amended*, 30 U.S.C. § 21-54 (1988).

175. 43 U.S.C. § 1701 (1988).

176. Oil Pollution Act of 1990, Pub. L. No. 101-380 § 1018, *reprinted in* 1990 U.S. Code Cong. & Admin. News 722 (to be codified at 33 U.S.C. § 2718).

with respect to"[177] oil spills or cleanup activities. States may impose additional liability or additional requirements with respect to liability or cleanup activities, and they can impose fines or penalties, either civil or criminal, for any "violation of law." Lastly, the Act provides that a state may enforce its financial responsibility requirements "on the navigable waters of the state."[178] The Act thus very clearly recognizes state power to legislate about spills, cleanup, and financial responsibility.

Thus, the nature of the public trust obligation, the tenor of the Supreme Court's decisions rejecting preemption challenges to state environmental laws, and Congress's explicit recognition of state power to legislate about liability for oil spills strongly suggest that state laws otherwise regulating oil transport and storage will also survive a preemption challenge. Under the equal footing doctrine, the states were assured title to the beds of navigable waters precisely in order to provide state protection of public trust interests. The states own and have dominion and sovereignty over tidelands and submerged lands under navigable waters for the benefit of their citizens.[179] While the state legislative authority over these lands and over public trust resources generally can be preempted by the federal government, there is no easily applied formula to determine when preemption occurs.[180]

State regulatory power is not presumptively preempted without a high degree of proof, unless Congress has "unmistakenly so ordained."[181] Furthermore, where the state's historic police powers are concerned, courts begin with the presumption that the federal law does not supersede those powers unless that was the clear and manifest purpose of Congress.[182] Although in recent years environmental regulation has come under concurrent federal and state jurisdiction, such regulation has traditionally been the responsibility of the states.[183] Given these principles, a convincing argument can be made that the courts should find no federal preemption when

177. *Id.*

178. *Id.* § 1019 (to be codified at 33 U.S.C. § 2719).

179. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988).

180. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

181. Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963).

182. Hillsborough County v. Automated Medical Laboratories, 471 U.S. 707, 715 (1985); Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978).

183. California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987); Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960).

state legislation protects state public trust resources. The state's powerful interest and high duty to protect such resources simply should not be preempted by federal law.

While federal law can preempt state law, it can also explicitly provide that federal agencies should abide by state law. The federal Coastal Zone Management Act[184] requires that federal agencies acting on their own or private activities that require a federal permit must operate consistently with a federally approved state coastal zone management program "to the maximum extent practicable."[185] The state program should explicitly include the public trust doctrine. The doctrine may then be used to require modification of federal government or federally authorized projects to comply with public trust principles.

VII. RECOMMENDATIONS FOR PUBLIC TRUST CONTROLS OF OIL TRANSPORT THROUGH WASHINGTON STATE

Nonpoint pollution, including pollution from oil transportation, is a difficult problem to solve, so difficult in fact, that Congress only authorized its "study" in the 1972 Federal Water Pollution Control Act amendments[186] and again in further amendments in 1987.[187] No comprehensive regulatory scheme for controlling this increasingly important form of pollution has ever been mandated by Congress. Because of this lack of regulation, the public trust doctrine provides an important methodology for controlling nonpoint pollution. Theoretically, any action that causes or contributes to lowering water quality or that damages fish or wildlife habitat is subject to control under the public trust doctrine.[188] Needless to say, in some cases, the legislature and courts must necessarily balance the public trust interest against private property interests.[189]

One plausible approach to such a balancing process would

184. 16 U.S.C. § § 1451-64 (1985).

185. *Id.* at 1456(c)(1).

186. Pub. L. No. 92-240, 86 Stat. 47 (1972) (codified at 33 U.S.C. 1155), *superseded by* Federal Water Pollution Control Act Amendment of 1972, Pub. L. No. 92-500, 88 Stat. 816 (1972) (codified at 33 U.S.C. § 1251-1376 (Supp. 1990)).

187. Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (1987) (codified at scattered sections of 33 U.S.C..

188. *See supra* note 50 and accompanying text.

189. For an example of a court engaging in such balancing, *see* City of Berkeley v. Superior Court, 26 Cal. 3d 515, 524, 606 P.2d 362, 373, 162 Cal. Rptr. 327, 338, *cert. denied*, 449 U.S. 840 (1980) (balancing public trust values and landowners' interests produced the principle that the public trust applies where tidelands are still physically

be for the courts to adopt the widely used legislative standard, "best practicable,"[190] or "best conventional,"[191] or "best available,"[192] technology to protect public trust interests. This approach would be especially applicable where public trust resources are to be committed to some other public purpose.

For example, let us assume that Cheer Oil Co. owns tidelands on Puget Sound and obtains local government permission through a Shoreline Management Act permit to build an oil transfer facility there. Cheer begins construction, but not before a citizen's group objects to this use of tidelands under the public trust doctrine. Cheer responds that its permit effectively defeats the public trust objection, especially since the oil transfer facility is a public purpose on a level equal to the public interest in the tidelands. A court might concur with Cheer that the facility could be built, but, on the basis of the public trust doctrine, it might nonetheless require that Cheer use the best conventional, or best available, technology for such construction. Thus, any time public trust resources are to be committed to some alternate public or private use, the legislature or the courts could require under the public trust doctrine (1) a full examination of all realistic alternatives, and (2) that the best conventional or best available technology be applied so as to minimize the risk to public trust resources. Alternatively, the doctrine could be used to require oil companies and others to develop *new* technologies where existing ones are inadequate. In addition to adopting a best available or best-conventional standard for oil transport activities, the Washington legislature, courts and administrative agencies can adopt some or all of the following recommendations to fully protect state public trust resources from damage by oil transport activities.

(a) The public trust doctrine as a basis for legislation.

The public trust doctrine can more clearly define the property rights subjected to state legislative police power. When so used, the public trust imposes a pre-existing public "easement" on private rights that antedates private property ownership. Of course, as a matter of equity, the public trust easement gen-

adaptable to trust uses, but not applicable where tidelands are substantially valueless for trust purposes).

190. R. FINDLEY & D. FARBER, ENVIRONMENTAL LAW 109, 113 (1983).

191. *Id.* at 106, 114.

192. *Id.* at 105.

erally would not apply to existing buildings or other structures. Whatever property the public held under the doctrine has been lost by laches or estoppel.

The Shoreline Management Act and local laws adopted under that act illustrate the power of the public trust doctrine in shaping property rights subject to legislative police power. The Shoreline Management Act does not explicitly state that the property rights it regulates are determined in part by the public trust doctrine, but the Washington Supreme Court in *Orion* had no difficulty drawing that conclusion, based simply on the existence of the doctrine as common law of the state.[193]

In the future, however, legislation designed to allocate or protect public trust resources should expressly state an intent to rely on the public trust doctrine to define the property rights of the regulated activity. Such a statement will draw a court's attention to the doctrine, will clearly reveal the intent of the legislation, and will reduce the risk of unconstitutional regulatory takings.

The Washington Supreme Court's *Orion* decision recognized such a use of the public trust doctrine.[194] The Washington court held that tidelands were subject to the public trust doctrine long before Orion acquired title.[195] This preexisting "easement" defined Orion's property rights so that the takings question was largely avoided. Such an analysis means that the standard constitutional challenge—that the regulations "go too far," or otherwise violate constitutional due process or uncompensated takings rules—must fail. If the public has an easement on the property, it antedates the private title, and thus no takings issue survives.

A similar line of analysis applies to the control of oil transport activities and the risk of pollution from such activities. The public trust protects the water quality that is essential for fisheries and wildlife habitat. Because the public trust doctrine dates from time immemorial, it clearly antedates anyone's right to threaten these resources or cause pollution.[196] Under

193. *See* Orion Corp. v. State, 109 Wash. 2d 621, 641, 47 P.2d 1062, 1073 (1987), *cert. denied*, 486 U.S. 1022 (1988).

194. *Id.*

195. *Id.* at 641, 747 P.2d at 1073.

196. This would apply to pollution caused by dumping wastes into public waters, or by appropriating and extracting waters that reduce assimilative capacity and worsen water quality, or that cause degradation of water quality by chemicals brought back to the stream by nonpoint "return flows."

this analysis the legislature is justified in adopting any level of water quality control that is politically acceptable. No polluter can claim a vested property right to continue depositing wastes or extracting water because all such rights are subject to the pre-existing burden of the public trust doctrine.

Applied to legislation concerning the control of oil spill risks or oil transportation activities, this approach allows the legislature to adopt any level of control it chooses. Such controls might create higher standards for oil transportation safety; zone against oil transportation facilities in ecologically sensitive areas; provide a basis for state oversight of federal activities that adversely impact public trust resources; squeeze federal preemption to its narrowest scope on the ground that states historically control public trust resources; or require modification of federal and federally permitted projects under the consistency provision of the federal Coastal Zone Management Act.[197]

(b) The public trust doctrine as a basis for administrative decisions.

The public trust doctrine can serve as a basis for administrative decisions without enactment of any further legislation. The Washington Supreme Court has adopted the doctrine as part of the state common law, which is binding on all state and local agencies. Accordingly, the doctrine empowers each agency to take or refuse administrative action to protect public trust resources; it also constrains agency action affecting those resources. State agencies must obey the supreme court's mandate in all actions that will have an impact on public trust resources. Every state agency that engages in a state project or that issues permits for private projects must consider and protect public trust resources pursuant to the supreme court's criteria for protection of those resources.

As noted above, Washington's Shoreline Management Act is not a full expression of the public trust doctrine.[198] Rather, it is an exercise of the state police power that especially concerns property rights defined by the public trust doctrine. The public trust doctrine still hovers over all agency decisions, as

197. 16 U.S.C. § 1451-67 (1985).

198. *See supra* notes 128-31 and accompanying text. Neither *Orion*, 109 Wash. 2d 621, 747 P.2d 1062 (1987), nor Caminiti v. Boyle, 107 Wash. 2d 662, 732 P.2d 989 (1987), suggest that legislation has supplemented the public trust doctrine.

well as legislative and judicial decisions, as a common law presence. Accordingly, state administrative agencies should always consider the impact upon trust resources of their decisions, even if such decisions are made pursuant to the Shoreline Management Act.

(c) The public trust doctrine as the basis for litigation.

The public trust doctrine establishes common law standards for judicial protection of the public's interest in navigation, fisheries, the environment, and in clean water, especially where no legislation exists on the topic. The public trust doctrine, as part of that common law, can be used by either the state or private citizens to require improved management of oil transportation activities. For example, the Washington Attorney General can enforce the public trust by seeking an injunction against an oil facility that was a source of oil leaking into streams or into salt water. Such a suit would be especially useful if no state statute covered the problem. Moreover, any citizen or group of citizens, or organization made up of state citizens, can sue to enforce the public trust and protect public trust resources.[199] Such citizen suits are critical where the attorney general declines to protect public trust resources.

VIII. CONCLUSION

From ancient to modern times, through kings, presidents, and governors, the public trust doctrine has protected and preserved public rights to navigation, commerce, and fisheries. Through judicial and legislative expansion, its protection now extends to wildlife habitat, recreational interests, and environmental quality. The expanded doctrine plays a vital role in preserving and protecting water and related resources against pressures from rapid development, technological change, and population growth.

As such, the public trust doctrine is a powerful legal tool for protecting the environment against damage from oil transportation and storage activity. Although the doctrine's scope has not yet been fully defined by Washington courts, their decisions to date indicate that they will continue to apply the doctrine expansively. Because of its breadth and because law

199. *See* Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971); *Caminiti*, 107 Wash. 2d 662, 732 P.2d 989 (1987), *cert. denied*, 484 U.S. 1008 (1988).

based on it may defeat a preemption challenge, the public trust doctrine is a most effective legal tool for management of oil storage on and transportation over Washington's tidelands, wetlands, and coastal waters.